

GAHC010121142012



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./81/2012

MD. NIZAM ALI @ NIZAMADDIN
S/O LATE HUSHAIN ALI, R/O NO. 2, BORSOLA, P.S. NORTH LAKHIMPUR,
DIST. LAKHIMPUR, ASSAM.

VERSUS

STATE OF ASSAM

Advocate for the Petitioner : MR.T J MAHANTA, MS.P BHATTACHARYA,MS.D DUTTA,MR.A BHATTACHARYYA

Advocate for the Respondent : , ,PP, ASSAM,

:::BEFORE:::
HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 20.06.2024

Date of Judgment & Order : 18.09.2024

JUDGMENT & ORDER (CAV)

Heard Mr. T. Gogoi, learned counsel for the appellant. Also heard Mr. M. P. Goswami, learned Additional Public Prosecutor for the State respondent.

2. This is an appeal under Section 374(2) of the Code of Criminal Procedure, 1973 against the impugned judgment and order dated 31.03.2012, passed by the learned Sessions Judge, Lakhimpur, North Lakhimpur in Sessions Case No. 11 (NL)/2010, convicting the accused/appellant under Section 376(f)/511/448 of the Indian Penal Code and sentenced him to undergo Rigorous Imprisonment for a period of 3 (three) years and to pay a fine of Rs. 5,000/- (Rupees five thousand) only in default of payment of fine to suffer Rigorous Imprisonment for 3 (three) months for the offence under Section 376(f)/511 of the Indian Penal Code and to undergo Rigorous Imprisonment for 15 (fifteen) days with fine of Rs. 1,000/- (Rupees one thousand) only in default Rigorous Imprisonment for 3 (three) days for the offence under Section 448 of the Indian Penal Code.

3. The prosecution case, in brief, is that on 10.11.2007, one Md. Saibur Rahman lodged an F.I.R. before the Nowboicha Police Outpost alleging *inter alia* that on 07.11.2007, at about 4.00 p.m., while his minor granddaughter (victim),

aged about 8 years, was alone in the house, the accused- Md. Nizam Ali entered into the house and committed rape on her by gagging her mouth. Upon receipt of the said F.I.R., the Officer-In-Charge of Nowboicha Police Outpost forwarded the same to the Officer-In-Charge, North Lakhimpur Police Station and accordingly North Lakhimpur P.S. Case No. 745/2007, under Sections 448/376(f) of the Indian Penal Code, was registered and started investigation.

4. On completion of investigation, the Investigating Officer submitted the Charge-Sheet against the present accused/ appellant under Sections 448/376(f)/511 of the Indian Penal Code and the learned Sessions Judge, Lakhimpur, North Lakhimpur, after considering the materials available on record and also finding *prima facie* case, framed charge against the present accused/appellant under the aforesaid Sections, to which he pleaded not guilty and claimed to be tried.

5. During the trial of the case, the prosecution examined as many as 9 (nine) numbers of witnesses including the Medical Officer and the Investigation Officers and the defence also examined 3 (three) numbers of witnesses in support of their case. The accused was also examined under Section 313 Cr.P.C. Thereafter, the learned Sessions Judge, Lakhimpur, North Lakhimpur, after hearing the parties and on perusal of records, vide judgment and order dated 31.03.2012, in Sessions Case No. 11 (NL)/2010, convicted the accused/appellant under Section 376(f)/511/448 of the Indian Penal Code and sentenced him to undergo Rigorous Imprisonment for a period of 3 (three) years and to pay a fine of Rs. 5,000/- (Rupees five thousand) only in default of payment of fine to suffer Rigorous Imprisonment for 3 (three) months for the

offence under Section 376(f)/511 of the Indian Penal Code and to undergo Rigorous Imprisonment for 15 (fifteen) days with fine of Rs. 1,000/- (Rupees one thousand) only in default Rigorous Imprisonment for 3 (three) days for the offence under Section 448 of the Indian Penal Code.

6. On being highly aggrieved and dissatisfied with the aforesaid impugned judgment and order dated 31.03.2012, passed by the learned Sessions Judge, Lakhimpur, North Lakhimpur in Sessions Case No. 11 (NL)/2010, the present appeal has been preferred by the accused/appellant.

7. Mr. T. Gogoi, learned counsel for the appellant, has submitted that the learned Court below did not consider the evidence on record in its true perspective and arrived at a wrong decision which is bad in law and liable to be set aside and quashed. He further submitted that there is absolutely no ingredients of Sections 376(f)/511 IPC and on the facts and circumstances of the evidence on record, it may be a case under Section 354 IPC and as such, the impugned conviction and sentence is bad in law and liable to be set aside and quashed. More so, there is no proper explanation of 3 (three) days delay in lodging the F.I.R. as the incident alleged to have been taken place on 07.11.2007 and the F.I.R. was lodged on 10.11.2007, but the learned Court below did not consider this vital aspect of the case and passed the impugned judgment and order, which is illegal and liable to be set aside. More so, the learned Sessions Judge, Lakhimpur, North Lakhimpur, did not give any weightage to the witnesses of the defence and passed the impugned judgment and order only on the basis of the evidence adduced by the prosecution witnesses.

8. Mr. Gogoi further submitted that the false and concocted allegations were brought against the accused/appellant only for their previous grudge and enmity which was arose for the use of a fishery leased out in favour of the accused/appellant. He further submitted that from the evidence of the Doctor, i.e. PW-4, it is seen that he did not find any sign of rape or violence on the private parts of the victim at the time of her examination. Further he submitted that the PW-8 carried out the investigation without having any power and authority and on the basis of such investigation, the PW-9, i.e. the I.O., filed the Charge-Sheet and thus, there are infirmity and lacunae in the investigation and hence, on the basis of such investigation, the present accused/appellant cannot be convicted.

9. He further submitted that the learned Court below did not give any weightage or importance on the evidence of DWs. Mr. Gogoi, learned counsel for the appellant, cited a decision of the Hon'ble Apex Court reported in **(2009) 16 SCC 487 (Sanjiv Kumar Vs. State of Punjab)**, and mainly emphasized on paragraph Nos. 24, 25 & 26 of the said judgment, and in paragraph No. 24 of the judgment, it has been held as under:

"24. Unfortunately, the defence of the appellant and the evidence adduced by him, has not even been considered by the High Court. It was content with observing that the Trial Court rejected the defence case as there was no evidence to substantiate it. Moreover, the evidence of the same witnesses as against the parents of the appellant was not believed, and his parents were acquitted by the Trial Court. The non consideration of the defence case by the High Court has resulted in miscarriage of justice, particularly because the conviction of the appellant is sought to be sustained on the strength of a presumption drawn against him by law. In such a case the consideration of the evidence in rebuttal becomes even more significant."

10. In regards to non-explanation of delay of 3 (three) days in lodging the F.I.R., Mr. Gogoi also relied on a decision of Hon'ble Supreme Court reported in **(2019) 5 SCC 403 (P. Rajagopal & Ors. Vs. State of Tamil Nadu)** and emphasized on paragraph No. 12 of the said judgment, which reads as under:

"12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving much importance to such delay. The Court is duty bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any motive for implicating the accused falsely. [See Apren Joseph v. State of Kerala, [\(1973\) 3 SCC 114](#); Mukesh v. State (NCT of Delhi), [\(2017\) 6 SCC 1](#)]."

11. Mr. Gogoi, learned counsel for the appellant, further submitted that from the evidences of PWs as well as the evidence of PW-8, it is seen that all the prosecution witness have improved their statements, previously made before the I.O., while adducing their evidence before the Court and such kind of witnesses cannot be readily believed and relied upon. In that context, Mr. Gogoi also relied on a decision of this Court passed in **Crl. Appeal No. 182/1999, decided on 09.05.2006**, and reported vide **2006 (4) GLT 278 (Iman Ali & Ors. Vs. State of Assam)**.

12. Relying on the above decisions and the statements made by the witnesses, it is submitted by Mr. Gogoi, learned counsel for the appellant, that the prosecution case cannot be believed and the witnesses adduced by the prosecution are not believable and in the same time, the learned Court below also did not consider the fact that the informant had lodged the F.I.R. only due to their previous grudge and enmity. Further he submitted that the learned

Sessions Judge, Lakhimpur, North Lakhimpur failed to consider the evidence of the Doctor, who found no sign of violence on the private parts of the victim, though it has been alleged that the accused/appellant tried to commit rape on the victim who was stated to be 8 (eight) years at the relevant time of incident. Accordingly, he submitted that the impugned judgment and order dated 31.03.2012, passed by the learned Sessions Judge, Lakhimpur, North Lakhimpur in Sessions Case No. 11 (NL)/2010, is liable to be set aside and quashed.

13. Mr. M. P. Goswami, learned Additional Public Prosecutor, submitted that the learned Sessions Judge, Lakhimpur, North Lakhimpur has not committed any illegality or mistake while convicting the accused/appellant under Section 376(f)/511/448 IPC and sentencing him for the convicted Sections. He further submitted that the statement of the victim is found to be consistent and her statement is also corroborated by the other PWs. It is the case of the prosecution that the informant was in her house at the relevant time of incident and it is also the admitted fact that the accused/appellant was fishing in the pond, which is adjacent to the house of the victim, and he came to the courtyard of the victim and tried to commit rape on her. There cannot be any reason to bring allegations against the accused/appellant by a 8 (eight) year old minor girl and her statement is also corroborated by the other witnesses, especially PW-2, who had seen the occurrence as she entered into the house of the victim and found that the accused was laying on the victim and rode on the top of her. This part of the evidence of PWs- 1 & 2, who are vital witness of the prosecution, cannot be rebutted by the defence by cross-examining or by adducing any other evidence by the defence. Rather it is the admitted fact that the accused was fishing in the pond adjacent to the house of the victim on the

day of incident which is also admitted by all the DWs in their evidence on record. He further submitted that even without any corroboration, the conviction can be based on the sole testimony of the prosecutrix if it inspires confidence. In the present case, there is nothing to disbelieve the minor girl of 8 (eight) years who brought such a nasty allegation against the accused/appellant. The learned Additional Public Prosecutor also stressed on the definition of rape under Section 375 IPC, wherein it is stated that the degree of penetration is not relevant to establish a case under Section 375 IPC.

14. Mr. Goswami, learned Additional Public Prosecutor, further submitted that the 3 (three) days delay in lodging the F.I.R. also cannot be considered as fatal to the case of the prosecution and in paragraph No. 45 of the judgment, the learned Sessions Judge had discussed in regards to 3 (three) days delay in lodging the F.I.R. and rightly held that the 3 (three) days delay in lodging the F.I.R. cannot be fatal for the prosecution case and there cannot be any ground to disbelieve the version of the victim and the other supporting witnesses about the occurrence. He accordingly submitted that there is no reason to make any interference in the judgment and order dated 31.03.2012, passed by the learned Sessions Judge, Lakhimpur, North Lakhimpur in Sessions Case No. 11 (NL)/2010, convicting the accused/appellant under Section 376(f)/511/448 of the Indian Penal Code.

15. After hearing the submissions made by the learned counsels for both sides, it is seen that as per the prosecution case, the accused sexually assaulted the victim, who was aged about 8 (eight) years old at the time of occurrence, by intruding into her house and using force. But, when her aunt- Firoza arrived

there and seeing the occurrence, the accused released the victim and managed to fled away from the place of occurrence. On the other hand, it is the case of the defence that the informant had instituted the case with some false and concocted allegation only to avenge their grudge for the dispute regarding a fish pond which has been leased to the accused.

16. So, before arriving at any decision, let us scrutinize the evidences of the prosecution witnesses as well as the defence witnesses.

17. The victim examined herself as P.W.-1 and as per her, on the day of occurrence, at about 3/4 p.m., while she was alone in her house, accused- Nizam Ali, who was fishing in the nearby pond, came to her house and called her out and caught hold of her hand and removed her underwear by force. The victim raised alarm, but the accused gagged her mouth. Then, the accused removed his wearing lungi and put his penis into her vagina and pressed her hard for which she felt pain. However, in the meantime, her aunt- Firoza arrived there and seeing her, the accused released the victim and fled away therefrom. Thereafter, she narrated the entire incident to her aunt- Firoza and also to her family members. She also deposed that her grandfather lodged the F.I.R. at Nowboicha Police Out Post and the police took her to hospital for medical examination, where the doctor medically examined her, and she was also produced in the Court of Chief Judicial Magistrate and got her statement recorded.

18. In her cross-examination, she deposed that on the day of occurrence, in the evening, she along with her younger brother and sister went to their uncle's

house and reported the occurrence, where several persons along with her grandfather, Saibur Rahman, Kalam and his wife, Loti and other 10/15 persons were present. She also deposed that the F.I.R. was lodged after 2/3 days of the occurrence. She denied when suggested that she had not stated in her statement (Ext.-1) that the accused penetrated his male organ to her vagina. She further deposed that while the accused was smearing spit in her vagina, at that time, her aunt- Firoza came and then the accused fled away therefrom. She also deposed that the accused was penetrating in her vagina to some extent and though the accused attempted to press his male organ in her vagina, but the same was not being entered. She denied when suggested that they have some land dispute with the accused for which her grandfather instituted the case with false and concocted allegation against the accused.

19. PW-2, Mustt. Firoza Khatun, deposed that the victim is her niece, whose house is adjacent to her residence. On the day of occurrence, at about 3/4 p.m., while she was working in her homestead, she noticed the accused, who was drawing out water for fishing from a nearby tank in the homestead of victim, called the victim several times, but she did not come out of the house. However, after several calls, the victim came out to the doorstep of the house, then the accused grabbed her and by gagging her mouth laid her down on the bed of the house. She immediately rushed to the house of the victim and found that accused laying the victim on the bed and rode on the top of her. She then asked the accused as to what he was about to do, to which the accused released the victim from his clutch and left the place of occurrence. Thereafter, the victim told her that the accused by removing her pant, pushed his male organ into her vagina. At that time, her younger brother, who was aged about 5/6 years, was

also present in the house.

20. In her cross-examination, she denied when suggested that she had not stated before the I.O. that at the time of occurrence, she was in her homestead and her house is contiguous to the house of the victim and while the accused grabbed the victim and by gagging her mouth laid her down on the bed of the house, she rushed to the house of the victim and found the accused laying the victim on the bed and rode on the top of the victim. She also denied that there was dispute regarding possession of the fish tank between the accused and the victim's family and the victim's grandfather instituted false case against the accused just to harass him. In her cross-evidence, she also deposed that seeing the accused lifting the victim, she immediately entered into the house of the victim within 2/3 seconds and saw the accused putting his spit on the vagina of the victim.

21. PW-3/informant, who is the grandfather of the victim, deposed that on the next day of occurrence, while he was at North Lakhimpur, he was called by Noor Mohammad and the victim to his residence and the victim told him that on the previous day, the accused, at about 3.00 p.m., came to her on the pretext of asking for a glass of drinking water and accordingly, while she came out from the house, the accused caught hold of her and laid her on a bed and by removing her pant committed rape on her. After hearing about the occurrence, he also asked Firoza (PW-2) about the same, to which she confirms that she had seen that accused committing rape on the victim on the previous day. Accordingly, he lodged the F.I.R. against the accused.

22. During his cross-examination, he deposed that the F.I.R. was lodged as per the version of victim (PW-1) and Firoza (PW-2). He denied when suggested that he instituted the case against the accused with concocted allegation just to harass the accused. He also deposed that the fishery from which the accused was drawing water for fishing on the day of occurrence belongs to him and due to financial crisis, he mortgaged the same to the accused.

23. PW-4 is the Doctor, who examined the victim, and as per him, there was neither any violence mark seen on the private parts of the victim nor there was any sign of recent sexual violation on her body. Vaginal swab was taken for microscopic determination of spermatozoa which reported negative. Accordingly, he opined that the occurrence of any sexual assault or rape could not be established medically. He also advised for radiological examination for determination of actual age of the victim, which reported her age below 8 years.

24. PW-5 is the husband of Firoza (PW-2) and he deposed that on the day of incident, he was at North Lakhimpur Town for some official works and when he returned home, he was told by his wife- Firoza that the accused did immoral act upon the victim by gagging her mouth, which was witnessed by her.

25. In his cross-examination, he deposed that the informant is his paternal uncle and though he leased out a fishing pond to the accused, but there was no dispute between the accused and the informant regarding that fishing pond. He denied when suggested that he had not stated before the IO that he was told upon by his wife- Firoza that the accused did immoral act upon the victim.

26. PW-6 is the mother of the victim. As per her, on the day of incident, while she was at North Lakhimpur Town, she got a telephonic information from Firoza Khatun (PW-2) that while the victim was sweeping the courtyard, the accused took her inside the house and laid down her on the bed and started removing her underwear. Thereafter, Firoza (PW-2) arrived at the place of occurrence and seeing her, the accused fled away. Then she immediately rushed to the house of one Habibur Rahman and informed him about the occurrence. She further deposed that after getting the information about the occurrence, she rushed to her home and found the victim crying and on being asked, the victim told her about the entire incident of committing rape on her by the accused.

27. During her cross-examination, she deposed that the pond wherefrom the accused was fishing on the day of alleged occurrence belongs to them and they have mortgaged the same to the accused. However, she denied that they were having some property dispute with the accused, for which they instituted false case against the accused.

28. PW-7, who is an independent witness, deposed that on the day of occurrence, at about 3.30/4.00 p.m., while he was in his paddy field, Firoza Khatun (PW-2) informed him that the accused did sexual intercourse with the victim by using force.

29. During cross-examination, he denied that he had not stated before the I.O. that after getting the information, he went to the house of the victim and asked her about the incident to which she told him that the accused had sexual intercourse with the victim by using force.

30. PW-8 is the I.O. of the case who took up preliminary investigation. He deposed that on 10.11.2007, while he was In-Charge of Nowboisha Police Out Post, one Saibur Rahman (PW-3) lodged an F.I.R. Upon which, he made GD Entry No. 147, dated 10.11.2007, and forwarded the same to the Officer-In-Charge of North Lakhimpur Police Station, which was registered as North Lakhimpur P.S. Case No. 745/2007, under Section 448/376(f) of the Indian Penal Code. During investigation, he visited the place of occurrence, prepared sketch map, got the victim girl medically examined, recorded the statements of the witnesses as well as the statement of the victim under Section 161 & 164 Cr.P.C. and also collected the medico legal report of the victim girl. After completion of preliminary investigation, he handed over the Case Diary along with the relevant documents to SI Utpal Changmai.

31. In his cross-examination, he denied when suggested that as an ASI he was not having power to investigate into the present case and also denied that he had done investigation of the case beyond the direction of the Officer-In-Charge of the PS. He stated that he had not forwarded the extract copy of the GD Entry No. 147, dated 11.10.2007, along with the F.I.R. while forwarding the same to the Officer-In-Charge of North Lakhimpur PS. He also stated that there was a delay of 3 (three) days in lodging the F.I.R. and the same has not been explained by the informant, nor had he put any question to the informant while entertaining the F.I.R. as to why there was a delay in reporting the occurrence. He also deposed that he had not prepared inspection note of his visit to the place of occurrence and also had not shown exact location where the victim was raped as well as had not seized any clothes of the victim.

32. From his cross-evidence, it further reveals that the PW-2 did not state before him that the accused called the victim several times and when she came out of the doorstep, the accused grabbed her and gagged her mouth and laid her down on the bed. Further it is also seen that she had not stated before the I.O. that immediately she rushed to the house of the victim and found the accused laying the victim on the bed and he rode on the top of her. Further there are some other contradictions found in the evidences of PW-3 & PW-5 wherein the PW-5 did not state before him that PW-2, i.e. Firoza, had seen the occurrence and it was reported by the victim. PW-5 also did not state before the I.O. that he came to know about the incident from his wife- Firoza that the accused did some immoral act with the victim.

33. He further deposed in his cross-evidence that the PW-6 also has not stated before him that she received the telephonic information from Firoza Khatun (PW-2) and accordingly, she arrived in the house. Further she has not stated before the I.O. that PW-2 (Firoza) noticed that while the victim was sweeping their courtyard, the accused took the victim on the bed of their house and started removing her undergarments etc. Similarly, PW-7 also did not state before PW-8 that Firoza came to him and informed that the accused had sexual intercourse with the victim and getting the information, PW-7 immediately came to the house of the victim and also asked about the occurrence.

34. PW-9 is another I.O., who filed the Charge-Sheet on the basis of the investigation done by the PW-8. He also deposed that at the time of occurrence, he was on leave and hence, the PW-8, ASI Golap Bailung, was In-charge of the

outpost during his leave period and started the preliminary investigation and after perusal of the Case Diary and other relevant documents, he filed the Charge-Sheet finding a *prima facie* case against the present appellant under Sections 448/376(f)/511 IPC.

35. The accused/appellant also adduced his own evidence as DW-1 and also produced 2 (two) other witnesses, i.e. DW-2 & DW-3, in support of his case. The accused/appellant mainly took the plea of previous grudge and it is the case of the defence as well as the appellant that on the day of incident, at about 4.00 p.m., while he was fishing in the fishery of Atikul Islam, i.e. the father of the victim, which was taken by him on lease, by using a pump set, said Atikul Islam and his wife restrained him from fishing, but when he continued fishing in the fishery, the informant falsely instituted the case against him that he attempted to commit rape on his granddaughter/minor daughter of Atikul Islam. He further deposed that after filing of the F.I.R., the informant demanded Rs. 3,000/- from him and he accordingly paid the said amount to the informant. Thereafter the informant also demanded an amount of Rs. 1 Lakh from him with an assurance that he would withdraw the F.I.R. lodged by him. He further denied the entire allegation that he attempted to commit rape on the victim on the pretext of drinking water in their house.

36. In his cross-evidence, he admitted that the fishery in question is adjacent to the house of the victim and denied when suggested that he deposed falsely about taking of the fisheries on lease. He also denied when suggested that the informant did not demand Rs. 3,000/-, and was paid by him and even after payment of the same, the informant again demanded Rs. 1 Lakh from him with

an assurance that he would withdraw the case.

37. DW-2, Md. Chand Mia, who is the younger brother of the accused/appellant, also supported the case of the defence. He also narrated the same story and deposed that on the day of incident, at about 4.00 p.m., the accused was fishing in the fishery, which he took on lease from Atikul Islam and Saibur Rahman (informant), but the said Atikul Islam and Saibur Rahman restrained the accused/appellant from fishing and on that pretext, there was a quarrel and with some false allegation, the informant lodged the F.I.R. against the accused/appellant. This defence witness also deposed about the payment of Rs. 3,000/- and demand of Rs. 1 Lakh from the accused/appellant to withdraw the F.I.R.

38. But, in his cross-evidence, he deposed that he has no personal knowledge as to whether the accused/appellant attempted to commit rape on the victim on the day of incident and also denied when suggested that the accused/appellant made no payment of Rs. 3,000/- to the informant. Further he denied when suggested that he deposed falsely only for the sake of the accused/appellant, who is his elder brother.

39. DW-3 is also related to the accused/appellant and she is sister-in-law of the accused/appellant and she narrated the same story corroborating the evidence of DW-1 & DW-2 and as per her, false and concocted allegation are being brought against the accused/appellant only for the dispute between the parties regarding the fishing in the pond which was leased out by the father of the Atikul Islam to the accused/appellant.

40. In her cross-evidence, she stated that she has no personal knowledge if any attempt was made by the accused/appellant to commit rape on the victim. She denied when suggested that she deposed falsely for the sake of the appellant/appellant as she is the close relative of the appellant.

41. So, after scrutinizing of the PWs and DWs, it is seen that it is the case of the prosecution that on the day of incident, the accused, while fishing in the pond adjacent to the house of the victim, came to the courtyard of the victim and then he gagged her mouth and forcibly laid her on the bed and tried to commit rape on her. In that process, he removed her panty and also opening his lungi, he tried to commit rape on her and in that process, he also put his penis into her vagina and pressed her hard and when she felt pain and raised alarm, her aunty, i.e. PW-2, immediately arrived at the place of occurrence and seeing her, the accused released the victim and fled away.

42. On the other hand, it is the case of the defence that the F.I.R. has been lodged by the informant, i.e. the grandfather of the victim, with some false and concocted allegation only for the previous grudge and enmity. It is the further plea of the defence that the pond, which belongs to the father of the victim, was taken on lease by the accused/appellant, but the parents of the victim restrained the accused/appellant for fishing in the pond and in that regard, there was a quarrel between the parties and only on that grudge, the informant lodged the F.I.R. with some false and concocted allegation. By adducing his own evidence as DW-1 and two other supporting DWs, it is also claimed that after lodging the F.I.R., the informant also demanded him Rs. 3,000/- and even after

payment of the said amount, the informant and his family members demanded another amount of Rs. 1 Lakh from him with an assurance that they will withdraw the F.I.R. lodged against the accused/appellant. Both the DWs- 2 & 3 also narrated the same story supporting the evidence of DW-1 that with some false allegation due to previous enmity, the F.I.R. has been lodged against the present appellant and they also narrated the story of demand of money by the informant.

43. But, from perusal of the evidence on record, it is seen that in the evidence of the victim, i.e. PW-1, there is no such major contradictions found inasmuch as she was subjected to sexual assault by the accused/appellant and the accused/appellant tried to commit rape on her by inserting his penis inside her vagina and the same goes unrebutted and the defence also could not demolish her evidence in that aspect. More so, as per the PW-2, who is also one of the vital witness of the entire prosecution case and claimed herself to be the eye witness. As per her, when she saw the accused while grabbing the victim, she immediately rushed to the house of the victim and saw that the accused laying the victim on the bed and rode on the top of her. When she asked the accused what he is doing, he immediately released the victim and fled from the place of occurrence.

44. The other PWs, i.e. PW-3 (the informant), PW-5 (husband of the PW-2), PW-6 (mother of the victim), and PW-7 (independent witness of the occurrence) also supported the case of the prosecution. It is a fact that except PW-2, the other PWs are not the eye witnesses of this case, however they heard about the incident from the victim and the PW-2 and their evidence to the extent that the

accused tried to commit rape on the victim/minor girl could not be rebutted by the defence neither by cross-examining the PWs nor by adducing any rebutting evidence. However, from the evidence of PWs, it is seen that there are some minor contradictions found in the evidences, which contradicts with their statements recorded by the I.O. under Section 161 Cr.P.C. But those contradictions are not a major contradictions and it does not affect the root of the case of the prosecution wherein the allegation of sexual assault is brought on the accused/appellant. More so, all the PWs have denied the suggestion put to them that false allegations are brought against the accused/appellant only for the dispute between them regarding the mortgage of pond to the accused/appellant.

45. It is a fact that the Doctor did not find any sign of mark of violence in the private parts of the victim and from the medical examination, it cannot be established that there was any rape on the victim, but there is no mention about the degree of penetration and there is also no evidence that the blood was coming out from the vagina of the victim and the only allegation brought against the accused/appellant is that he was trying to commit rape on the victim and in that process, he tried to enter his penis inside the vagina of the victim. But, in that process, the PW-2 arrived at the place of occurrence and immediately the accused fled from the place of occurrence and hence, there was only attempt of rape on the victim and in that context, the Doctor may not find any medical evidence to establish the rape on the victim. More so, the victim girl was examined after 3 (three) days of incident and thus the mark of violence could not be found during her medical examination. But from the entire evidence on record, it seen that the case of the prosecution could not be

rebutted that the accused/appellant sexually assaulted the minor victim and tried to commit rape on her.

46. As stated above, it is the case of the defence that due to previous enmity regarding the mortgage of the pond, the false case is lodged against the appellant. But all the DWs have admitted the fact that on the day of incident, the accused was fishing in the pond adjacent to the house of the victim. That part of the case of the prosecution is also admitted by the defence. In the same time, it is seen that DWs- 2 & 3 are the relative of the accused/appellant and they have no personal knowledge if the accused/appellant committed any such offence as alleged in the F.I.R. Further, reasonable doubt arises in regards to the veracity of the plea of the defence and question arises as to why the accused/appellant paid Rs. 3,000/- to the informant and as to why the informant demanded another Rs. 1 Lakh from the informant to withdraw the case if nothing has been committed by the accused /appellant. Thus the plea of demand of money creates a reasonable doubt as to why the informant will demand Rs. 3,000/- and subsequently Rs. 1 Lakh if nothing has been committed by the accused/appellant. The learned Sessions Judge, in its judgment and order, had discussed these points in paragraph No. 46 of the judgment, which is extracted hereinbelow:-

"46. Though, the accused attempted to project that out of land dispute with PW.3 he was falsely implicated in the case, yet the evidence adduced by him shows that on the day of occurrence he was fishing in the pond adjacent to the house of the victim, which otherwise confirms the version of PW.1 , PW.2 and PW.3. According to the DWs, while the accused was fishing in the pond, Atikul and his wife, PW.6 restrained him from fishing in the said pond but as he did not listen to them and continued to fish in the pond after 2/3 days, PW.3 instituted this case against him on concocted and got up facts. He further stated that after institution of the case, PW.3 demanded Rs.1 Lakh from him to withdraw the FIR lodged against him, and he infact paid Rs.3,000/- only

to Saibur. DW.2, Md. Chand Mia, the brother of DW. 1, and DW.3, Mustt. Saleha Khatun also deposed in the same tune with that of DW.1 regarding payment of Rs.3,000/- only by the accused to Md. Saibur Rahman, but they failed to produce any receipt of payment of an amount of Rs.3,000/- to Saibur as per his demand. If we take for the argument sake the version of DW.1 regarding payment of an amount of Rs.3,000/- to Saibur Rahman to withdraw the case to be true, the same also goes to support the prosecution case that on the day of occurrence, he attempted to commit rape on the victim. If the allegation against him regarding commission of rape on the victim brought falsely by PW.3 what impelled him to make payment of the amount to him."

47. It is the another plea of the defence that there was 3 (three) days delay in reporting the matter before the police or lodging the F.I.R. in that regard. Indisputably, from the record, it is seen that there is a delay of 3 (three) days in lodging the F.I.R. by the informant, but the same cannot be considered as fatal to the case of the prosecution, nor it cast any cloud of suspicion on the credibility of the prosecution story. More so, from the evidence on record, it is seen that on the day of incident neither the informant nor the parents of the victim was at home and the informant got the information on the next day of the incident. Similarly, the mother of the victim was also working at North Lakhimpur Town and she got the telephonic information from the PW-2 and thereafter the informant lodged the F.I.R. against the accused/appellant. Thus, the informant and the other family members of the victim had to take a decision and in that process, there may be a delay of 2/3 days in lodging the F.I.R., but that cannot be considered as fatal to the prosecution case.

48. So, from the entire discussion made above, it appears that the evidence of the PW-1 could not be rebutted by the defence and there is no reason to disbelieve the minor girl whose evidence is found consistent with her statement recorded under Section 164 Cr.P.C. and that apart, her evidence is also

corroborated by the PW-2, who is the eye witness of the prosecution and the other witnesses also supports the prosecution version, though they are not the eye witnesses of the case.

49. It is a settled law that the child witness also can be considered as a competent witness under Section 118 of the Evidence Act and there is no legal principle that a child would not be able to recapitulate facts in his or her memory. However, the probability of tutoring a child witness cannot be denied, but that cannot be the only reason to disbelieve the child witness who is otherwise considered as a competent witness.

50. In regards to the acceptance of evidence of child witness, the Hon'ble Supreme Court in case of **Hemmat Sukhadeo Wahurwagh Vs State of Maharashtra**, reported in **(2009) 6 SCC 712 (FB)**, has held that "*... though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and molded, but it is also accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.*"

51. Here in the instant case, it is to be reiterated that the evidence of the victim is consistent and the defence could not rebut the evidence of the child witness nor there is any statement made by the child witness to disbelieve the child with whom the alleged incident of sexual assault had happened.

52. Thus, it is seen that there is no reason to disbelieve the prosecutrix,

whose evidence goes un rebutted and remain consistent in every stages. It is a settled law that the victim of a sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence if her sole testimony inspires confidence and trustworthy.

53. The Apex Court in the case of **Moti Lal Vs. State of M.P.**, reported in **2008 0 AIR (SC) 882**, has held in paragraph Nos. 7 & 9 as under:

"7. It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police. The Indian women as tendency to conceal such offence because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. In the instant case the suggestion given on behalf of the defence that the victim has falsely implicated the accused does not appeal to reasoning. There was no apparent reason for a married woman to falsely implicate the accused after scarring her own prestige and honour.

9. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge leveled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix. There is no rule of law or practice incorporated in the Indian Evidence Act, 1872 (in short Evidence Act) similar to illustration (b) of Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult

and of full understanding the Court is entitled to base a conviction on her evidence unless the same is own to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. This position was highlighted in State of Maharashtra v. Chandraprakash kewalchand Jain (1990 91) scc 550)."

54. In **State of Himachal Pradesh v. Raghubir Singh, (1993) 2 SCC 622; 1993 SCC (Cri) 674**, the Hon'ble Supreme Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. A similar view has been reiterated by the honourable Supreme Court in Wahid Khan v. State of Madhya Pradesh (2010) 2 SCC 9; AIR 2010 SC 1, placing reliance an earlier judgment in Rameshwar S/o kalian Singh v. State of Rajasthan, AIR 1952 Sc 54. Thus the law that emerges on the issue is to the effect that the statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The Court may convict the accused on the sole testimony of the prosecutrix.

55. Thus, it is seen that the prosecution has succeeded to prove that the accused/appellant sexually assaulted the victim girl, who was a minor at the relevant time of incident, and thus, the prosecution could establish a case under Section 376(f)/511/448 of the Indian Penal Code against the accused/appellant. Accordingly, it is seen that the learned Sessions Judge, Lakhimpur, North Lakhimpur has rightly convicted the accused/appellant under Section 376(f)/511/448 of the Indian Penal Code and therefore, I do not find any reason to interfere in the judgment and order passed by the learned Court below. More

so, the sentence imposed on the accused appellant is also found to be reasonable and justified and thus, it also needs no interference of this Court.

56. Resultantly, the impugned judgment and order dated 31.03.2012, passed by the learned Sessions Judge, Lakhimpur, North Lakhimpur in Sessions Case No. 11 (NL)/2010, convicting the accused/appellant under Section 376(f)/511/448 of the Indian Penal Code, is upheld and the present appeal, being devoid of merit, stands dismissed.

57. The criminal appeal stands disposed of in terms above.

JUDGE

Comparing Assistant